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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 CHRISTOPHER SCOTT,

11 Defendant.

Case No. CR08-82RSL

ORDER DENYING MOTION  
TO MODIFY SENTENCE

12 This matter comes before the Court on Defendant's "Motion for Modification of  
13 an Imposed Term of Imprisonment Pursuant to 18 U.S.C. § 3582(c)(2)" (Dkt. # 702).<sup>1</sup>  
14 Defendant asks the Court to reduce his sentence pursuant to the Fair Sentencing Act of  
15 2010, Pub. L. No. 111-220, and Amendment 750 to the United States Sentencing  
16 Guidelines. The Court DENIES the motion.

17 **I. BACKGROUND**

18 Defendant pleaded guilty on August 7, 2008, to one count of possession of crack  
19 cocaine with intent to distribute in violation of 21 U.S.C. § 841(a) and (b)(1)(A) and 18  
20 U.S.C. § 2 and one count of being a felon in possession of a firearm in violation of 18  
21 U.S.C. § 922(g)(1). Dkt. ## 273, 277, 304. In his Rule 11(c)(1)(C) plea, he  
22 acknowledged and stipulated to possessing 74.1 net grams of cocaine base and 296.5  
23 additional grams of cocaine hydrochloride with the intent to distribute. Dkt. # 277. He

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25 <sup>1</sup> Defendant initially filed his motion pro se but was assisted by counsel in filing a  
supplemental memorandum. Dkt. # 721.

1 further agreed that, under the version of U.S.S.G. § 2D1.1(c) then in effect, these drug  
2 quantities resulted in a base offense level of 32 and that an addition two-level increase  
3 was warranted for Defendant's possession of a dangerous weapon. Id. Nevertheless,  
4 after noting that the parties were "free to argue the application of any other provisions of  
5 the United States Sentencing Guidelines," the agreement states:

6           Notwithstanding the Guidelines range resulting from these  
7 calculations, pursuant to Rule 11(c)(1)(C) of the Federal Rules of  
8 Criminal Procedure, the parties acknowledge and agree that the  
appropriate sentence of imprisonment to be imposed by the Court at the  
time of sentencing should be within the range of 156 to 204 months.

9 Id.

10           After reviewing the terms of the agreement against the "yardstick" of the  
11 Guidelines, the Court accepted the agreement. Cf. Freeman v. United States, 131 S. Ct.  
12 2685, 2696–97 (2011) (Sotomayor, J., concurring). Compare Dkt. # 681 at 9–10 ("This  
13 is an 11(c)(1)(c) plea with an agreed range. Mr. Scott would like to break that, but that  
14 will have consequences for him. It is an agreed range. We are still required to calculate  
15 the guidelines by the Ninth Circuit."); id. at 37 ("As Mr. [Lombardi] indicates, it is my  
16 task to first determine for the record and for reporting requirements what the actual  
17 proper range is here."), with id. at 39 ("Now, that is just doing the guidelines. From  
18 there I look at the plea agreement. Now, the plea agreement here is pretty close to the  
19 guideline range, it is 156 to 204."), and id. at 41 ("Be that as it may, I do look at this  
20 agreed sentencing range in the plea agreement as something that is binding. It is an  
21 11(c)(1)(c), so it is binding on the Court."). Pursuant to the agreement, the Court  
22 imposed a 168-month custodial sentence. Id. at 41–42. It also ordered the Defendant to  
serve a concurrent 120-month custodial sentence for his firearm violation. Id.

## 23 **II. DISCUSSION**

24           "As a general matter, courts may not alter a term of imprisonment once it has  
25 been imposed." United States v. Hicks, 472 F.3d 1167, 1169 (9th Cir. 2007). Section

1 “3582(c)(2) creates an exception to this rule by allowing modification of a term of  
2 imprisonment if: (1) the sentence is ‘based on a sentencing range that has subsequently  
3 been lowered by the Sentencing Commission’ and (2) ‘such a reduction is consistent  
4 with applicable policy statements issued by the Sentencing Commission.’” United  
5 States v. Wesson, 583 F.3d 728, 730 (9th Cir. 2009). Defendant satisfies neither prong.<sup>2</sup>

6 To be clear, Amendment 750 did in fact make substantial changes to the manner  
7 in which cocaine base scores under § 2D1.1. That is not the issue here. The issue is  
8 that, as discussed, Defendant entered into and was sentenced pursuant to a Rule  
9 11(c)(1)(C) plea. And as Justice Sotomayor explains in her controlling concurrence in  
10 Freeman, a defendant sentenced pursuant to a Rule 11(c)(1)(C) plea agreement is  
11 typically not eligible for § 3582(c)(2) relief, despite the fact that “the parties . . . may  
12 have considered the Guidelines in the course of their negotiations.” 131 S. Ct. at  
13 2696–97 (Sotomayor, J., concurring).<sup>3</sup> Rather, he is eligible for a sentence modification  
14 only if his plea agreement “expressly uses a Guidelines sentencing range applicable to  
15 the charged offense to establish the term of imprisonment” or it is “evident from the  
16 agreement itself” “that the basis for the [agreement’s] specified term is a Guidelines  
17 sentencing range applicable to the offense to which the defendant pleaded guilty.” Id. at  
18 2697–98; see also id. at 2702 (Roberts, C.J., dissenting).

19 In this case, Defendant’s plea agreement does not demonstrate either of these  
20 circumstances. The range provided, 156 to 204 months, is not found anywhere in the

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21 <sup>2</sup> As a threshold matter, the Court notes that Defendant’s waiver of his right to appeal  
22 or collaterally attack his sentence or conviction does not preclude his ability to seek  
§ 3582(c)(2) relief. United States v. Lightfoot, 626 F.3d 1092, 1095 (9th Cir. 2010).

23 <sup>3</sup> Because Judge Sotomayor’s concurrence provided the narrowest grounds for allowing  
24 Rule 11(c)(1)(C) defendants § 3582(c)(2) relief, it controls. Marks v. United States, 430 U.S.  
25 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining  
the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that  
position taken by those Members who concurred in the judgments on the narrowest grounds  
. . . .’” (alteration in original) (citation omitted)).

1 Guidelines. U.S.S.G. Sentencing Table. Nor are there any ranges that include either  
2 156 or 204 months. *Id.* Moreover, this is not a case where the parties derived their  
3 range from an adjustment to an identifiable Guidelines range. *Cf. Freeman*, 131 S. Ct.  
4 at 2700 n.9 (Sotomayor, J., concurring) (“If the agreement itself made clear that the  
5 parties arrived at the 53–month term of imprisonment by determining the sentencing  
6 range applicable to Freeman’s offenses and then halving the 106–month figure at its low  
7 end, he would have been eligible under § 3582(c)(2).”). To the contrary, the agreement  
8 plainly states that, “[n]otwithstanding the Guidelines range resulting from these  
9 calculations,” the sentence imposed “should be within the range of 156 to 204 months.”  
10 Dkt. # 277. This language rebuts any argument that the parties intended to “use[] a  
11 Guidelines sentencing range to establish the term of imprisonment.” *Cf. Freeman*, 131  
12 S. Ct. at 2698 n.5, 2700 n.9 (Sotomayor, J., concurring).

13 In addition, the Court is unpersuaded by Defendant’s contention that the agreed-  
14 upon range was “based on” the Guidelines because it “encompasses several different  
15 ranges,” including one that coincided with the Court’s rough “yardstick” calculations.  
16 Suppl. Mem (Dkt. # 721) at 2–3. Justice Sotomayor cited her disagreement with this  
17 very argument to explain her split from the Kennedy plurality:

18 Contrary to the plurality’s view, the fact that U.S.S.G. § 6B1.2(c) (Nov.  
19 2010) instructs a district court to use the Guidelines as a yardstick in  
20 deciding whether to accept a (C) agreement does not mean that the term  
21 of imprisonment imposed by the court is ‘based on’ a particular  
22 Guidelines sentencing range. The term of imprisonment imposed by  
23 the sentencing judge is dictated by the terms of the agreement entered  
24 into by the parties, not the judge’s Guidelines calculation.

25 \* \* \*

26 I therefore cannot agree with *Freeman* that § 3582(c)(2) calls upon  
district courts to engage in a free-ranging search through the parties’  
negotiating history in search of a Guidelines sentencing range that  
might have been relevant to the agreement or the court’s acceptance of  
it. Nor can I agree with the plurality that the district judge’s calculation  
of the Guidelines provides the basis for the term of imprisonment  
imposed pursuant to a (C) agreement.

1 131 S. Ct. at 2696 (Sotomayor, J., concurring) (emphasis added) (internal citation  
2 omitted); id. (“Allowing district courts later to reduce a term of imprisonment simply  
3 because the court itself considered the Guidelines in deciding whether to accept the  
4 agreement would transform § 3582(c)(2) into a mechanism by which courts could  
5 rewrite the terms of (C) agreements in ways not contemplated by the parties.”).


6 In short, having accepted the parties’ agreement, that binding plea agreement  
7 became “the foundation for the term of imprisonment to which the defendant is  
8 sentenced.” Id. at 2696. “At the moment of sentencing, the [C]ourt simply  
9 implement[ed] the terms of the agreement it ha[d] already accepted.” Id. at 2696.  
10 Because Defendant’s specific agreement, Dkt. # 277, does not rely on the Guidelines,  
11 there is no basis for according Defendant the relief he seeks.

12 Defendant was not sentenced “based on a sentencing range that has subsequently  
13 been lowered by the Sentencing Commission” and cannot show that “a reduction is  
14 consistent with applicable policy statements issued by the Sentencing Commission,”  
15 e.g., U.S.S.G. § 1B1.10(a)(1) (stating that an individual is only eligible for a sentence  
16 reduction if he or she “is serving a term of imprisonment, and the guideline range  
17 applicable to that defendant has subsequently been lowered as a result of an amendment  
18 to the Guidelines Manual”). See Wesson, 583 F.3d at 730. Accordingly, “§ 3582(c)(2)  
19 simply does not apply.” Freeman, 131 S. Ct. at 2698 n.5 (Sotomayor, J., concurring).

### 20 **III. CONCLUSION**

21 For all of the foregoing reasons, Defendant’s motion is DENIED.

22 DATED this 1st day of March, 2012.

23   
24 Robert S. Lasnik  
25 United States District Judge  
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